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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 801

WILLIAM SPINELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals on rehearing *en banc* (Pet. App. A-21—A-77) are reported at 382 F. 2d 871. The initial opinions of the court of appeals (Pet. App. A-1—A-20) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1967. A petition for rehearing was denied on September 12, 1967. Mr. Justice White ex-

tended the time for filing a petition for a writ of certiorari to November 11, 1967, and on November 8, 1967 the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government is precluded from obtaining a rehearing *en banc* of a decision of a panel of a court of appeals reversing a criminal conviction on a finding of lack of probable cause for a search warrant.

2. Whether, in the circumstances, the search warrant was properly issued and executed.

3. Whether petitioner was entitled to a preliminary hearing notwithstanding the return of an indictment.

4. Whether the indictment against petitioner was constitutionally defective.

5. Whether petitioner's constitutional rights were violated when, after arraignment, he stated his address in connection with his release on bail and the return of certain belongings seized at the time of arrest.

6. Whether the trial court abused its discretion in admitting certain evidence or gave erroneous instructions to the jury.

7. Whether the evidence was sufficient to sustain the conviction.

STATEMENT

Petitioner was charged in the United States District Court for the Eastern District of Missouri with violating 18 U.S.C. 1952 by traveling in interstate

commerce with intent to carry on an illegal gambling enterprise and thereafter carrying on this enterprise. After a jury trial, he was convicted and sentenced to imprisonment for three years and fined $5,000. On appeal, a panel of three judges, with one judge dissenting, ruled that the conviction should be reversed on the ground that evidence had been seized under a search warrant issued without probable cause. Upon petition by the government, a rehearing *en banc* was ordered. Thereafter, the full court decided that there was no infirmity in petitioner's conviction, rejecting all of the contentions repeated here. Two of the eight judges (the majority of the original panel) dissented solely on the question of probable cause to sustain the warrant.

The search warrant authorized a search for bookmaking paraphernalia at Apartment F of the Chieftain Manor Apartments in St. Louis County, Missouri. The affidavit on the basis of which the United States Commissioner found probable cause was made by F.B.I. agent Robert Bender on Wednesday, August 18, 1965. It averred:[1] "The Federal Bureau of Investigation has been informed by a confidential reliable informant that William Spinelli [petitioner] is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers of WYdown 4-0029 and WYdown 4-0136." The affidavit related that telephone company records showed that those numbers belonged to telephones in Apartment F

[1] The affidavit is set forth in full at Pet. App. A-86—A-88.

at 1108 Indian Circle Drive. The affiant further swore that on August 6, 1965, and on three occasions in the following week (August 11, 12 and 13), F.B.I. agents watched petitioner drive his automobile from East St. Louis, Illinois to St. Louis, Missouri; that on those three occasions and again on August 16, the agents saw petitioner park his automobile on the parking lot used by residents of the Chieftain Manor Apartments (including the building at 1108 Indian Circle Drive); and that on August 13, an agent saw petitioner enter Apartment F. Agent Bender further alleged that petitioner was personally known to him, and to other federal and local enforcement agents, "as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers."[2]

Following the issuance of the search warrant, F.B.I. agents stationed themselves across from Apartment F. When petitioner emerged from the apartment about two hours later, they served him with an arrest warrant, and used a key found in the course of searching him pursuant to this arrest to unlock the door to Apartment F. They then executed the search warrant and seized items (R. 144-147, 173-181) de-

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[2] At the hearing on the motion to suppress the evidence obtained under this search warrant, it was revealed that the informant who had told Special Agent Bradley earlier in the month that petitioner was using these specific telephone numbers in conducting a gambling operation had, since 1963, been furnishing the agent with weekly information which had proved to be reliable (M. 10, 32, 35). ("M" refers to the hearing on pretrial motions. "R" refers to the transcript of the trial.)

scribed as gambling paraphernalia by an expert witness at the trial (R. 192-196, 199-217).[3]

ARGUMENT

1. Petitioner's initial argument that the government is not constitutionally or statutorily permitted to petition for rehearing *en banc* is dispositively answered by *Forman* v. *United States*, 361 U.S. 416. There, distinguishing *Sapir* v. *United States*, 348 U.S. 373, on which petitioner relies (Pet. 15), this Court unanimously upheld the appropriateness of a government request for rehearing even where the original opinion had directed a judgment of acquittal. As to the original ruling of the court of appeals, this Court said (361 U.S. at 426):

> Its original direction was subject to revision on rehearing. The original opinion was entirely interlocutory and no mandate was ever issued thereon. It never became final and was subject to further action on rehearing. * * *

See, also, *United States* v. *Healy*, 376 U.S. 75, 77-80.

2. The F.B.I. agent's affidavit adequately supported the Commissioner's finding of probable cause, and the warrant was properly executed.

(a) The affidavit contained sufficient facts from which the Commissioner could perform his function of independently evaluating the existence of probable cause. The affidavit disclosed that an informant, at-

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[3] The other events material to disposition of this case are accurately summarized in petitioner's statement (Pet. 10-11).

tested to be reliable, had informed the F.B.I. that petitioner was utilizing telephone numbers WYdown 4-0029 and WYdown 4-0136 in operating a handbook. This information, in turn, was corroborated by the other facts in the affidavit—that an F.B.I. surveillance showed that petitioner was currently engaged in regular interstate travel to an apartment that, according to telephone company records, contained the very telephones which petitioner was reported to be using in gambling operations; and, in addition, the affiant stated that he and other law officers knew petitioner to be a gambler. While any one of these facts, standing alone, might not have been sufficient, it was clearly reasonable for the Commissioner to conclude that the totality of circumstances established probable cause for the issuance of the warrant.

The Commissioner, moreover, was apprised of "underlying circumstances" corroborating the informant, viz., the surveillance by the agents, the matching telephone numbers and the reputation of the petitioner. See *Jones* v. *United States*, 362 U.S. 257. Neither *Aguilar* v. *Texas*, 378 U.S. 108, nor *Riggan* v. *Virginia*, 384 U.S. 152, requires more than was present here. In those cases, the applications for the warrants stated simply that undisclosed information from reliable sources showed illegal activity at particular premises. Significantly, the Court said in *Aguilar*, that, if the facts and results of a surveillance "had been appropriately presented to the magistrate,"—as they were reported here—"this would, of course, present an entirely different case." 378 U.S. at 109, n. 1.

(b) The federal officers delayed execution of the warrant until petitioner emerged from the apartment, a period of about two hours from the time of their arrival at the building. This did not violate the requirement of Rule 41, F. R. Crim. P., that a search warrant shall command a search "forthwith." Rule 41 itself sets a ten-day time limit on executing search warrants. Thus, "forthwith" can not mean "immediately." Certainly a delay of two hours, at least in the absence of untoward design, does not vitiate the authority to search. There is nothing in this case to suggest that the delay was either prejudicial or anything other than prudent. As the court below observed (Pet. App. A-41): "In this case, had the officers knocked at the door the evidence of gambling might well have been flushed down the commode before the officers could have forced their way into the apartment."

(c) The warrant authorized the seizure of "bookmaking paraphernalia, scratch sheets, bet tabs, pay and collection sheets, bookmaking records, baseball schedules, books and records of bets received, accounts, bookmaker's ledger sheets, two telephones." There is no merit to petitioner's complaint that the executing officers exceeded their authority in seizing, among other items, an adding machine, pencil sharpener, blank deposit slips, $22.00 in currency, a radio, a pair of glasses, a watch, graph paper, four pens, two pencils, the lease for the premises, and five telephones (instead of two). All of these items, when connected with other objects obviously related to the gambling

business, could properly be considered to fall within the general category of "bookmaking paraphernalia".

3. After petitioner's arrest on August 18, he was released on bond. The preliminary hearing scheduled for September 3 was postponed on the government's motion, and on September 15, 1965, the grand jury returned an indictment. The return of the indictment supplanted the function of the preliminary hearing by establishing probable cause, and it thus eliminated any need for a preliminary hearing. Rule 5(c), F. R. Crim. P., does not create or protect the right to discovery that petitioner claims. The courts of appeals, with the possible exception of the District of Columbia,[4] have consistently so held. See, *e.g.*, *United States* v. *Aiken*, 373 F.2d 294 (C.A. 2), certiorari denied, October 9, 1967; *United States* v. *Chase*, 372 F.2d 453, 467 (C.A. 4); *Byrnes* v. *United States*, 327 F.2d 825, 834 (C.A. 9), certiorari denied, 377 U.S. 970.

4. The indictment was in no way deficient. It charged that petitioner violated 18 U.S.C. 1952 by traveling between Illinois and Missouri at various times during the period of August 6 to August 18, 1965, with intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity, namely, a business enterprise involving gambling in violation of Section 563.360, Mo. Rev. Stat. 1959 (Pet. App. A-81), and by carrying on this unlawful

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[4] The law in the District of Columbia is not clear. Compare *Crump* v. *Anderson*, 352 F.2d 649 (C.A.D.C.), with *Ross* v. *Sirica*, 380 F.2d 557 (C.A.D.C.).

activity thereafter. More specificity was not required. *Turf Center, Inc.* v. *United States*, 325 F.2d 793 (C.A. 9). As to the claim that Congress did not intend this statute to be applied to a single individual, a similar argument was recently rejected by this Court under a companion statute, 18 U.S.C. 1953. *United States* v. *Fabrizio*, 385 U.S. 263. Equally without merit are petitioner's contentions that the statute is unconstitutionally vague, see *Turf Center, Inc.* v. *United States*, 325 F.2d 793 (C.A. 9); *United States* v. *Zizzo*, 338 F.2d 577 (C.A. 7), certiorari denied, 381 U.S. 915, and violates the Equal Protection Clause and the Tenth Amendment.

5. On the morning following his arrest, petitioner appeared before a United States Commissioner with his retained counsel, was advised of his constitutional rights, and admitted to bail. At that time he signed an appearance bond in which he gave an Illinois address. At the trial, the government introduced evidence that petitioner had appeared at the F.B.I. office about fifteen minutes after his release on bond to request the return of the keys which had been taken from him at the time of his arrest, one of which he mentioned was to his residence in Illinois (R. 149-150). The government also established that petitioner gave an Illinois address to a deputy marshal when his release on bond was being processed (R. 236).[5]

The record does not support petitioner's claim that he was compelled to furnish his address to the F.B.I.

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[5] There was other evidence of petitioner's Illinois address and his traveling between Illinois and Missouri (R. 121-128, 139-140, 143-144).

agent in order to get back his keys. It shows that petitioner appeared voluntarily at the F.B.I. office and asked for his keys. Despite petitioner's assertions, nothing in the record indicates that when petitioner voluntarily went to the F.B.I. office the agent conditioned the return of the keys on a statement from petitioner. While the record is not clear on whether petitioner was required to tell the deputy marshal his address so that he could be released on bond (see R. 237), there was no error in admitting evidence of this statement even if we assume it was obtained under such circumstances. Information as to where a defendant may be located is an essential and proper element of an effective bail system. Moreover, there is no indication that petitioner demurred at giving the information or that counsel sought in any way to secure the release of his client without this information. Petitioner was not prevented from having his counsel with him when he sought the keys or filled out the bail form. Hence *Escobedo* v. *Illinois*, 378 U.S. 478, does not apply. Not only did the events occur before indictment, but the circumstances are not remotely similar to those set forth in *Massiah* v. *United States*, 377 U.S. 201, or *Beatty* v. *United States*, No. 338, decided October 23, 1967, where government agents obtained post-indictment statements from defendants in the absence of counsel at a time when both the defendants and their lawyers were unaware that the government was investigating their activities.*

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* This case was tried before *Miranda* v. *Arizona*, 384 U.S. 436, and, apart from the fact that in this case petitioner had

6. Petitioner's attacks on various rulings made at trial do not warrant further review.

(a) The F.B.I. agent who qualified as an expert witness was thus properly allowed to explain to the jury that the various paper exhibits were used in the gambling business (R. 199-217). *United States* v. *Altiere*, 343 F.2d 115, 119 (C.A. 7), reversed on other grounds, 382 U.S. 367. Otherwise, the codes and symbols would have been meaningless to the jury. Contrary to petitioner's assertion (Pet. 36), *United States* v. *Sette*, 334 F.2d 267 (C.A. 2), is not to the contrary; there the officers in charge of the investigation attempted to supply a defect in the proof by stating their conclusion that the defendant had a proprietary interest in the gambling business involved, and that practice, quite unlike the expert explanation in this case, was held to be impermissible.

(b) In addition to showing that two telephones had been installed in the apartment involved herein in November 1964, the government also showed the installation in the same month of two other telephones at a second apartment (R. 23-26, 114-115) where petitioner was shown to have engaged in a handbook operation between November 1964 and January 1965 (R. 30-32, 60-79, 97-102, 137-138). This evidence was properly admitted, as the court below found, to prove both lack of innocent purpose and involvement in a "business enterprise", elements of the crime

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received full warnings, had counsel, and was not being "interrogated" by the deputy marshal, *Johnson* v. *New Jersey*, 384 U.S. 719, makes *Miranda* inapplicable.

charged. The fact that the other handbook operation occurred seven months earlier than the operation alleged in the indictment did not make evidence thereof too remote to be admissible. Its weight was properly a jury question.

(c) The State statute involved, Section 563.360, Mo. Rev. Stat. 1959 (Pet. App. A-81 to A-82), makes it a crime to occupy any room with any book, sheet, or blackboard for the purpose of recording a bet. The court instructed the jury that it could find that petitioner violated this statute if it found that petitioner was engaged "in accepting wagers on athletic contests and in furnishing odds or point spreads in athletic contests as a business enterprise" (R. 294). Since the instruction required the jury to find that petitioner both accepted wagers and recorded odds, it was proper even if Missouri law permits the furnishing of odds.

7. Petitioner's challenge to the sufficiency of the evidence—rejected by the district court and the court of appeals *en banc*—is not an issue calling for further review. The total circumstances of this case—regular interstate trips to the apartment, the solitary presence of petitioner in the room with the gambling paraphernalia for over two hours, the prior operation of the handbook—warranted the conclusion that petitioner traveled in interstate commerce with intent to carry on an illegal gambling enterprise and thereafter carried on this illegal activity.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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